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In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE W. HAMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

MILLARD FILMORE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
KATHERINE WINFREE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-26)[1] is reported at 533 F. 2d 1006.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1976. On May 21, 1976 Mr. Justice Stewart extended the time for the filing of a petition for a writ of

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[1]All citations to the court of appeals' opinion refer to the appendix in No. 75-1847.

certiorari in No. 75-1847 to and including June 21, 1976. That petition was not filed until June 22, 1976, and the petition in No. 76-5178 was not filed until August 6, 1976; therefore, both petitions are out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence showed the existence of a single narcotics conspiracy as charged in the indictment.

2. Whether the evidence was sufficient to support the jury's finding that petitioners were members of the conspiracy.

3. Whether evidence of monitored telephone calls in furtherance of the conspiracy, made after an unindicted co-conspirator was arrested, was inadmissible on the ground that the arrest ended the conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiracy to possess heroin and cocaine with intent to distribute, in violation of 21 U.S.C. 846. Petitioner Hammond was sentenced to 18 months' imprisonment, to be followed by three years' special parole; petitioner Thompson was sentenced to 18 months' imprisonment, to be followed by one year's special parole. The court of appeals affirmed (Pet. App. 17-26).[2]

As set forth in the opinion of the court of appeals (Pet. App. 18-21), the evidence showed that petitioners and five indicted co-conspirators were involved in an illegal

[2]One other co-defendant also was convicted at petitioner's trial. Charges against another co-defendant were severed during that trial due to his illness; he was later tried separately and convicted.

scheme to transport, deliver, and distribute heroin and cocaine in the Detroit metropolitan area.

To establish petitioners' and others' roles in the conspiracy, the government relied primarily on the testimony of Franklin D. Westbrook, an unindicted co-conspirator. On February 21, 1974, federal agents arrested Westbrook at the Detroit Metropolitan Airport minutes after his arrival from Los Angeles (Tr. 70-72, 344-345). Westbrook consented to a search of his luggage, which was found to contain large quantities of heroin and cocaine (Tr. 38-39, 346-347, 363-365, 375-377). He later agreed to cooperate with the government in obtaining evidence against others involved in the conspiracy (Tr. 205-206, 257-259, 348).

Westbrook testified at trial that on February 8, 1974, he received a telephone call in Los Angeles from petitioner Thompson in Detroit. Petitioner Thompson, a long time friend with whom Westbrook had once lived, expressed an interest in obtaining narcotics (Tr. 30-35). After receiving the call, Westbrook went to the residence of Clarence Allen, his "connection," to secure a supply of heroin and cocaine (Tr. 35). The drugs were later delivered to Westbrook by a "runner" who worked for Allen (Tr. 37, 40).

On or about February 12, 1974, Westbrook flew to Detroit with a quantity of narcotics for distribution. After checking into a motel, he contacted George Lowry, who came to the motel and purchased an ounce of heroin (Tr. 42-43, 162). Thereafter Westbrook called petitioner Thompson to advise him of his arrival. Petitioner Thompson stated that he wished to purchase two or three ounces of heroin. They arranged a meeting, and Westbrook went to petitioner Thompson's residence "[t]o distribute narcotics" (Tr. 43-46, 50, 172). Petitioner Thompson made a telephone call, and petitioner Hammond,

whom Westbrook knew as "Bo," arrived shortly thereafter, purchased two or three ounces of heroin for $1,000 an ounce, and left (Tr. 48-52).

After a further sale to one Fred Hammond, Westbrook returned to Los Angeles with $11,000, which he delivered to Allen; he received a $1,000 "payoff" for his role in the transactions (Tr. 53-55, 60-61).

Approximately a week later, Westbrook received another call from petitioner Thompson. During the ensuing conversation, petitioner Thompson expressed an interest in making a purchase of drugs and indicated that he might come to Los Angeles (Tr. 64-65). Westbrook then went to Allen's home and advised that he had received calls from Detroit and could "possibly turn over a large amount of drugs" (Tr. 65-66). Allen said he had 22 ounces of heroin and five ounces of cocaine available, and Westbrook explained how the deliveries were to occur in Detroit (Tr. 67).

After arranging to be met at the airport, Westbrook flew to Detroit with the 22 ounces of heroin and five ounces of cocaine (Tr. 70). He was arrested at the airport by federal agents, and the narcotics were seized (Tr. 72). In co-operation with the government, Westbrook contacted the individuals to whom the narcotics were to be delivered. He placed telephone calls to petitioner Thompson and Fred Hammond, which, with Westbrook's permission, were monitored and recorded by Drug Enforcement Administration agents (Tr. 74-76, 89-90, 290).

During a recorded conversation[3] between petitioner Thompson and Westbrook, petitioner Thompson indicated that he was preparing everyone to complete the

[3]The district court overruled petitioners' objections to the admission of the conversations, holding that at that point there was sufficient evidence of a conspiracy between the Hammonds, petitioner Thompson, and Westbrook (Tr. 431-432).

transactions. He stated that "Fred" (Hammond), "Bo" (petitioner Hammond), and "Sonja" (Brown) were "ready to get down." Petitioner Thompson advised that petitioner Hammond and his brother would be able to handle "the same thing that [they] got before, or more" (App. 152b-159b).[4]

Thereafter, Fred Hammond and Marian Lewis visited Westbrook and undercover agent Joe Gordon in the motel room Westbrook had rented. Hammond and Westbrook discussed the price and quality of the drugs the latter had. When Hammond was committed to a purchase, Gordon gave a pre-arranged signal to agents in the adjoining room, who arrested Hammond and Lewis (Tr. 292, 295).

In another telephone conversation with Westbrook, petitioner Thompson advised that he had spoken with petitioner Hammond, who wanted "something right now" (App. 164b-166b). Petitioners and Sonja Brown later arrived at the motel (Tr. 297). Petitioner Hammond complained of the quality of heroin received in his previous transaction with Westbrook, expressed his desire to buy two ounces for the present, and indicated that he would buy more when he had disposed of the two ounces (Tr. 298-300). Brown also negotiated a purchase (Tr. 300-301). When the signal was given, agents in the adjoining room made the arrests (Tr. 302). Twenty-four hundred dollars were found and seized in the incidental search of petitioner Hammond (Tr. 383).

ARGUMENT

1. Petitioners contend (No. 75-1847, Pet. 11-13; No. 76-5178, Pet. 14-18) that the evidence showed multiple conspiracies rather than a single conspiracy as charged in the indictment and that therefore there was a fatal variance between the indictment and the proof.

[4]"App." refers to the government's Appendix in the court of appeals.

The test for determining whether the evidence establishes a single conspiracy is " 'whether there is a common purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is concerted action to achieve this end.' " *Koolish* v. *United States*, 340 F. 2d 513, 524 (C.A. 8), certiorari denied, 381 U.S. 951. The crucial question is whether the alleged conspirators had "knowledge of the plan's general scope, if not its exact limits, [and] sought a common end." *Blumenthal* v. *United States*, 332 U.S. 539, 559. See also *United States* v. *Cirillo*, 499 F. 2d 872, 887 (C.A. 2), certiorari denied, 419 U.S. 1056; *United States* v. *Perez*, 489 F. 2d 51, 61-62 (C.A. 5), certiorari denied, 417 U.S. 945.

The evidence fully supported the jury's findings concerning the existence of a single conspiracy in this case. As the court of appeals correctly concluded, the evidence, when viewed in the light most favorable to the government, established beyond a reasonable doubt that there was an agreement "to sell and distribute drugs, controlled substances, in the Detroit area, illegally" (Pet. App. 23). Allen was supplying heroin and cocaine to Westbrook; the latter then arranged to sell the narcotics to Brown, Lowry, Fred Hammond, and petitioners, for further sale and distribution in Detroit. The jury thus could properly find that there was one overall agreement among the various parties to perform different functions in order to carry out the single objective.[5] See *United*

[5]*Kotteakos* v. *United States*, 328 U.S. 750, upon which petitioners primarily rely, is inapposite. There, the evidence proved eight or more different conspiracies by separate groups of defendants which had no connection with each other; the court gave no multiple conspiracy instruction but instructed the jury that the acts and declarations of one conspirator bound all. Here, by contrast, the court gave both an adequate instruction on the law of multiple conspiracies (Tr. 562) and a cautionary instruction (Tr. 560) that only the acts and declarations of each defendant were to be considered in determining whether each was a member of the conspiracy, thereby properly submitting both issues to the jury.

States v. *Bastone*, 526 F. 2d 971, 979-980 (C.A. 7), certiorari denied, No. 75-1239, May 19, 1976; *United States* v. *Steinberg*, 525 F. 2d 1126, 1133 (C.A. 2), certiorari denied, No. 75-1040, May 19, 1976; *Poliafico* v. *United States*, 237 F. 2d 97, 103-104 (C.A. 6), certiorari denied, 352 U.S. 1025.

2. Petitioners' argument (No. 75-1847, Pet. 7-10; No. 76-5178, Pet. 6-14) that the evidence was insufficient to sustain their convictions is insubstantial.[6] As shown above, the evidence established a conspiratorial scheme whereby Westbrook received his supply in Los Angeles and through petitioner Thompson arranged the distribution to retailers in Detroit, including petitioner Thompson.[7] Petitioner Thompson was instrumental in making the arrangements for the sales of heroin. His February 8, 1974, telephone call to Westbrook precipitated Westbrook's initial trip to Detroit, during which petitioner Thompson arranged a meeting between petitioner Hammond and Westbrook. At that time, petitioner Hammond purchased two ounces of heroin from Westbrook. Petitioner Thompson also assisted Westbrook in the sale of heroin to Fred Hammond. After Westbrook's return to Los Angeles, petitioner Thompson again telephoned him, indicated his desire to buy drugs,

[6]Petitioner Hammond's contention (No. 75-1847, Pet. 7-10) that there was no direct evidence to establish his participation in the conspiracy and that his conviction was therefore based upon "impermissible pyramiding of inferences" (No. 75-1847, Pet. 8) is in reality no more than a challenge to the sufficiency of the evidence.

[7]Once the conspiracy is established, "slight evidence" may be sufficient to connect individual conspirators thereto. *United States* v. *Edwards*, 488 F. 2d 1154, 1157 (C.A. 5); *United States* v. *Marrapese*, 486 F. 2d 918, 921 (C.A. 2), certiorari denied, 415 U.S. 994; *United States* v. *Nunez*, 483 F. 2d 453, 460 (C.A. 9), certiorari denied, 414 U.S. 1076. Here, the evidence connecting Thompson to the conspiracy was strong.

and mentioned the possibility of traveling to Los Angeles for that purpose. On February 21, 1974, at a second meeting arranged by petitioner Thompson, petitioner Hammond agreed to buy two more ounces of heroin and indicated that he would buy more in the future. When arrested, petitioner Hammond was carrying $2,400. The recorded telephone conversations between petitioner Thompson and Westbrook further confirmed petitioners' participation in the conspiracy. Viewed in the light most favorable to the government, the evidence was, as the court of appeals properly held, sufficient to prove that petitioners were "willing participants in the concerted plan of operation and performed acts in furtherance of its accomplishment" (Pet. App. 23).[8]

3. Finally, petitioners assert (No. 75-1847, Pet. 13-16; No. 76-5178, Pet. 19-22) that the conspiracy, if any existed, ended with the arrest of Westbrook and that the district court erred in admitting into evidence the monitored telephone conversations between Westbrook and petitioner Thompson. This contention is frivolous. Although the arrest of one conspirator may terminate his role in the conspiracy and render his extra-judicial statements inadmissible against co-conspirators (*Fiswick* v. *United States*, 329 U.S. 211, 217), it does not *per se* end the conspiracy or change the status of the remaining members. *United States* v. *Sarno*, 456 F. 2d 875, 878 (C.A. 1); *United*

[8]Petitioner Hammond's contention (No. 75-1847, Pet. 7-9) that due process is violated by allowing the government to prove elements of the crime of conspiracy through circumstantial evidence and inferences from facts in evidence is clearly without merit. Whether the evidence is direct or circumstantial, the jury must use its experience to weigh the probabilities and determine guilt beyond a reasonable doubt. *Holland* v. *United States*, 348 U.S. 121, 140. Moreover, the court gave proper instructions on the standards for reasonable doubt (Tr. 543-546) and the law concerning circumstantial evidence (Tr. 566-567).

States v. *Cohen*, 197 F. 2d 26, 29 (C.A. 3). The termination of a conspiracy is generally a question of fact to be determined from the circumstances of the case.[9] *United States* v. *Sarno*, *supra*, 456 F. 2d at 878. If co-conspirators remain at large, fully capable of perpetuating the conspiracy, hearsay statements made by them in furtherance of the illegal agreement are admissible. *United States* v. *Register*, 496 F. 2d 1072, 1079 (C.A. 5), certiorari denied *sub nom. Cochran* v. *United States*, 419 U.S. 1120.

It is clear from the evidence that statements made by petitioner Thompson during his recorded conversations with Westbrook were made in furtherance of the conspiracy. Petitioner Thompson was unaware of Westbrook's arrest and unquestionably intended to perpetuate the ongoing illicit agreement.[10] As the court of appeals correctly concluded (Pet. App. 26), the arrest of Westbrook did not terminate the conspiracy, and the conversations were properly admitted.[11]

[9]The court properly submitted this issue to the jury (Pet. App. 25; Tr. 560-561).

[10]Contrary to petitioner Hammond's contentions, the instant case is not in conflict with *Krulewitch* v. *United States*, 336 U.S. 440, and *Fiswick* v. *United States*, *supra*. In *Fiswick*, this Court held that confessions and admissions made by an arrested conspirator are not made in furtherance of the conspiracy and are therefore inadmissible against co-conspirators. This Court in *Krulewitch* held that hearsay statements made in furtherance of a post-conspiracy understanding to conceal the conspiracy are not admissible. The recorded conversations between Westbrook and petitioner Thompson were clearly not confessions or admissions made by an arrested conspirator, nor were they made in the concealment phase of a terminated conspiracy.

[11]Indeed, the conversations were admissible against petitioner Thompson as his own admissions; thus, their admissibility need not be upheld solely on the basis of the co-conspirator exception to the hearsay rule.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
KATHERINE WINFREE,
Attorneys.

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